UNITED ASIAN BANK BHD.

v.

PUSHPAMANI SHANMUGAM

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[ORIGINATING SUMMONS NO. 110 OF 1982]
21 JUNE 1983

LAND LAW: *Charge - Application of sale - Opposition - Irregularity of notice of demand - Non compliance of O. 83 r. 3, Rules of the High Court - Lack of consideration - Undue influence.*

EVIDENCE: *Affidavit - Whether inadmissible - Sworn before commencement of proceedings - Irregularity - Whether curable.*

The chargor (Pushpamani d/o Shanmugam) opposed the application of the chargee (United Asian Bank Bhd.) for an order of sale of the land charged to the latter but was unsuccessful. The chargor appealed.

Held:

[1] The affidavit by S. Palakrishnan sworn in support of the application was admissible though it had been sworn before the commencement of the proceedings. The non-compliance with rules of Court procedure and practice was an irregularity that was curable. The matter of admissibility of evidence is one for the discretion of the Court. As the irregularity in the case appeared to be far too formal or minor, there was no necessity for the reswearing of the affidavit. (*H. Stacey v. Diamond Metal Products Co. Ltd. & Anor*. [1935] MLJ 249 distinguished; Practice Direction of the Chancery Division [1969] 2 ALL ER 639; O. 41 r. 4, Rules of the High Court 1980).

[2] The letter of demand from the chargee, though addressed not to the chargor but to Nesco Sdn. Bhd., did not affect the proceedings or act as a release of the chargee's claim. The letter of demand is not obligatory. In any case, a copy of the letter sent to the chargor constituted actual notice of the demand.

[3] Failure to file particulars pursuant to O. 83 r. of 3 of the Rules of the High Court was an irregularity that could be cured or excused.

[4] The other points raised by the chargor, of lack of consideration and undue influence, were unfounded or frivolous.

[Application allowed]

Cases referred to:
H. Stacey v. Diamond Metal Products Co. Ltd. & Anor. [1935] MLJ 249
Bowen v. Bowen [1873-74] Vol VII IR 251

Legislation referred to:
National Land Code 1965, s. 254
Rules of the High Court 1980, O. 2, O. 41 r. 4, O. 83 r. 3

For the plaintiff - M. Krishnasamy; M/s. Nahappan, Peri & Partners
For the defendants - C. Vijaya Kumar; M/s. Sri Ram, Zulkifly & Kumar

JUDGMENT

Peh Swee Chin J:

The chargor (appellant) had earlier opposed the application from the chargee (respondent) for an order of sale of the land charged to the chargee. The opposition was unsuccessful, hence this appeal.

Several points were taken by the chargor though not all of which were pressed in arguments by learned Counsel for her.

The first point taken by learned Counsel was to the effect, that the affidavit of one S. Palakrishnan, sworn to on 15 July 1983 and filed herein together with and in support of the originating summons herein on 2 August 1982, was sworn before the commencement of proceedings i.e., 2 August 1982, and was therefore inadmissible in evidence. Counsel first relied on the case of *H. Stacey v. Diamond Metal Products Co. Ltd. & Anor.* [1935] MLJ 249. In that case, an attempt was made to use in evidence, in an action commenced by writ, an affidavit made by one Hunter who made the affidavit and who also died before the commencement of the action. Terrell J held first that he had no discretion to admit it if the adverse party objected, after considering the general rule about evidence being given *viva voce* at a trial and the few exceptions to it. Further he held that it was also *prima facie* inadmissible for being sworn in an action not yet commenced and even if the affidavit could be treated as one in an intended action, the objection that the other party had no opportunity to cross-examine the said Hunter was fatal. He thought that the attempt to use the affidavit was to get round Evidence Ordinance. He said that the Court ought to exercise its discretion in disallowing it. That case is distinguishable from the present case, e.g., in that case it was an action commenced by a writ, involving ultimately a full trial where oral evidence would have to be taken and right to cross-examine thereto given as a matter of right. Here, the application was an originating summons where normally only affidavit evidence would be permitted and where no cross-examination would normally be allowed on such affidavits. In so far as it can be regarded as a cut and dry authority for excluding the affidavit in question here, for being sworn before the date of filing the originating summons herein, I would also, like Terrell J exercise my discretion, but the other way round, by allowing it for reasons to be set out hereafter, with great respect to Terrell J.

Counsel also relied on the case of *Bowen v. Bowen* [1873-74] Vol VII IR 251 which I did not find illuminating. No arguments or reasoning were really set out in the very brief report. Counsel there in the case of a similar affidavit, merely objected to it and Counsel for the other side asked for adjournment to reswear it. The Court refused the adjournment and dismissed the application for which the said affidavit was filed. I would also not follow it for reasons to be set out below. Counsel also relied on Practice Direction of the Chancery Division [1969] 2 ALL ER 639 issued in England. It, *inter alia*, states that the Court will not reject such a similar affidavit in future and will assume, that the state of affairs, mentioned in such an affidavit, has continued until the date of commencement of proceedings except in one exception i.e., where it is required to prove facts which have to be shown to be existing at the date of commencement of proceedings such as that money is owing at the commencement of proceedings, and in the case of such exception, the Court will direct it to be resworn. The Practice Direction of the Chancery Division, while not binding at all on this Court, shows, obliquely, the Division's relaxed and flexible attitude to such an affidavit, implying that such an objection when it can be raised under the Practice Direction, is not fatal, but may result in an order or direction requiring the reswearing of the affidavit.

I exercised my discretion to allow the affidavit in question because the time of filing the affidavit did not appear to be anything more than an irregularity. An irregularity pertaining to the non-compliance of rules of Court procedure and Court practice is curable. Even if it were such an irregularity as to amount to a nullity, in my view, it can still be cured or excused by the Court for the distinction between an irregularity and nullity, in regard to a failure to comply with the requirements of the Rules of the High Court, 1980, and with it, the question of non-curability of a nullity has also gone overboard.

Another reason for allowing it is that, the admissibility of evidence, is a matter of discretion for the Court, bearing in mind that an affidavit is but a mere species of evidence.

Further, O. 41 r. 4 of the Rules of the High Court, 1980, expressly provides:

> An affidavit may, with the leave of the Court, be filed or used in evidence notwithstanding any irregularity in the form thereof.

Strictly speaking, the date of an affidavit may not be a patent irregularity of form, but if after going behind it and looking at the date of filing of an originating summons herein, such an irregularity becomes clear or patent, then the Court has again a discretion under the Rules to allow it to be used.

I could have ordered the reswearing of the affidavit called in question, but I declined to do so, because the irregularity appeared to be far too formal or minor to justify such an exercise.

The second point taken on behalf of the chargor was that the notice of demand, (as distinct, e.g., from a statutory notice of default by Form 16D under s. 254 of the National Land Code), was not in compliance with the provisions of the National Land Code. Counsel was referring to the letter demanding payment, dated 13 February 1982 from the chargee's solicitors and addressed to Nesco Sdn. Bhd., copies of which were extended to, *inter alia,* the chargor. Nesco Sdn. Bhd., was the company that enjoyed or utilized the overdraft facility granted by the chargee and secured by the charge created on the chargor's land in question. I found the point to be of no substance. What is required under the provisions of the National Land code is that a notice of default either in Form 16D or Form 16E, as the case may be, should be sent prior to any subsequent application for an order of sale. A so-called letter of demand from the chargee is understandably desirable for a borrower who sleeps on his obligations but is certainly not obligatory. In case I am wrong on this, in any event, a copy of the letter from the chargee's solicitors, referred to above, constituted actual notice of such demand by the chargee though it was not addressed to the chargor. The fact that it was not addressed to the chargor could never be taken as an indication that the chargee was thereby releasing its claim against the chargor.

Another point taken by learned Counsel for chargor was that particulars pursuant to O. 83 r. 3 of the Rules of the High Court had not been filed. In my view, failure to do so again would be a curable irregularity or an irregularity that could be excused by the Court. The order I have very often made in other applications for a similar order of sale where no such particulars have been filed, has been, instead of adjourning the applications to enable such particulars to be filed, in each case a usual order of sale but that this order would not be extracted until the filing of such particulars.

Several other points were raised by chargor in her affidavit sworn to on 11 November 1982 which I found totally unfounded or frivolous or which her learned Counsel did not find it worthwhile to address the Court on. She took the point that the charge was not supported

by valuable consideration, while she never had denied and was not in a position also to deny that money secured by the said charge was in fact advanced to Nesco Sdn. Bhd. pursuant to the terms of the charge.

She also alleged undue influence, an allegation totally unsupported by any evidence and totally misplaced. Yet another complaint was that the chargee had owned her a fiduciary duty to ensure that she obtained independent legal advice. Knowing fully well that the charge documents were prepared by solicitors whose services she must have paid for, she had now said that the advice was less than independent. I do not feel bound at all to launch into any legal dissertation on this point which was, to repeat, unfounded or frivolous.

I therefore made an order in terms of the Originating Summons, with costs.

Also found at [1983] 2 CLJ 148